STATE OF MICHIGAN

IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST AGREEMENT DATED MARCH 7, 1990 and LAURENCE WOLF, as Trustee and individually,

Plaintiffs/Appellants,

v.

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER and THOMAS W. BARWIN,

Defendants/Appellees.

Supreme Court No.

COA No. 262721

Circuit Court No. 03-051450-CK
Hon. Edward Sosnick

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PLAINTIFFS/APPELLANTS' BRIEF IN OPPOSITION TO LEAVE FOR APPEAL

CERTIFICATE OF SERVICE

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should deny leave to appeal the decision of the Court of Appeals where the Court of Appeals applied the only reasonable definition of "property damage" consistent with the language of MCL 691.1413, the intent of the legislature and the historic interpretation of "property damage" in Michigan law?

Appellants Answer: Yes.

Appellees Answer: No.

The Court of Appeals Would Answer: Yes.

2. Whether this Court should deny leave to appeal the question of whether the City of Ferndale was engaged in a proprietary function where the wrongful conduct is the City's pursuit of the construction, operation and lease of a commercial cellular communications tower for profit?

Appellants Answer: Yes.

Appellees Answer: No.

The Court of Appeals Would Answer: Yes.

3. Whether this Court should deny leave to appeal to review an argument rejected by the Court of Appeals simply because the City of Ferndale wished the Court of Appeals said more about the rejection of the City's argument?

Appellants Answer:	Yes.
Appellees Answer:	No.
The Court of Appeals Would Answer:	Yes.

4. Whether this Court should deny leave to appeal where there was sufficient evidence regarding the City of Ferndale's tortious conduct, where the argument was rejected by the Court of Appeals and where the issue was not initially appealed by the City?

Appellants Answer:	Yes.
Appellees Answer:	No.
The Court of Appeals Would Answer:	Yes.

INTRODUCTION

Laurence G. Wolf Capital Management Trust Agreement Dated March 7, 1990 and Laurence Wolf (collectively "Wolf") filed suit against the City of Ferndale (the "City") as a result of the City's blatant and malicious conduct to usurp Wolf's business opportunities.

Specifically, Wolf negotiated with a wireless communications carrier to place a small cellular antennae on his building located at the corner of Nine Mile and Woodward in Ferndale. Without Wolf's knowledge, the City told his wireless communication customer that Wolf's antennae would not be approved and that a tower on City owned property was the only viable option. It should come as no surprise that the wireless communications carrier signed a contract with the City and abandoned Wolf's proposed antennae.

On June 17, 2004, in *Louis J. Eyde Limited Family Partnership v. Charter Township of Meridian*, No. 248312, 2004 WL 1366936 (Mich. App. June 17, 2004) (attached as Exhibit C), *lv. app. denied* 472 Mich. 866, 692 N.W.2d 839 (2005), the Court of Appeals addressed very nearly the same issues presented here. Specifically, the Court of Appeals confirmed that a private property owner can have a cause of action against a government entity where that governmental entity improperly uses its zoning powers to steal a cellular tower customer from the private property owner. This Court correctly denied leave to appeal in that case.

In its Judgment, the Circuit Court made two critical rulings that the City of Ferndale did not appeal but which the City now seeks improperly to challenge. First, the Circuit Court concluded that Wolf had sufficient facts to take his tortious interference claim to a jury. Exhibit A, Judgment, pp 2-3. Second, the Circuit Court determined that Defendants were engaged in a proprietary function, relying upon *Eyde, supra*. Judgment, p. 3. ***Neither of these rulings were appealed by Defendants.***

The only basis for granting summary disposition to Defendants was the Circuit Court's erroneous conclusion that the type of damages sought by Wolf did not fall within MCL 691.1413's language allowing for recovery for "injury to persons or property." Thus, the Circuit Court concluded that while Wolf had stated a tortious interference claim against Defendants for activities that were "proprietary," Wolf could not recover any damages under the exemption to governmental immunity expressed in MCL 691.1413 because of the nature of Wolf's injuries. This ruling was clear error.

The Court of Appeals properly reversed the Circuit Court, finding that "property damage" as used in Michigan's governmental immunity statute covered a variety of forms of injury to "property" and not just "physical damage" to property as asserted by the City. *See* Exhibit O, Court of Appeals Opinion.

In sum, the Court of Appeals Opinion is rational and applied the law as well as common sense. Indeed, the Court of Appeals noted it "cannot rewrite the statute," which is what the City's argument would have required. Thus, this Court should deny leave to appeal.

STATEMENT OF FACTS

I. Nature Of The Action

Plaintiffs filed the instant action on July 28, 2003. The Complaint alleged Defendants had tortiously interfered with Plaintiffs' business relationships (Count I) and tortiously interfered with Plaintiffs' prospective advantageous relationships (Count II).

Specifically, Plaintiffs alleged that the City interfered with Plaintiffs relationships and agreements to place a cellular antennae on his building located in Ferndale. Plaintiffs further alleged that these actions were taken so that the City could obtain the same fees Plaintiffs sought by placing a cellular tower on City owned land.

II. Factual Background

The Trust owns a building commonly known as the Ferndale Center Building, 22750 Woodward Avenue, Ferndale, Michigan (the "Building"). The Building is located on the southeast corner of Nine Mile Road and Woodward Avenue. It is located in a prime and preferred location for the purpose of leasing or using roof space for the construction of a cell phone antennae together with office space or equipment room within the building. Cato Dep., pp. 11-12, Exhibit D.

In or around 1999, Wolf reached agreement with AT&T Wireless ("AT&T") regarding the leasing of space on the roof of the Building for construction of a cell antennae. Exhibit E, First Lease. Wolf and AT&T applied to the City for a variance to locate the antennae on the roof. The City denied Wolf's and AT&T's application for a variance for the antennae on the grounds that the antennae was injurious to the harmony of the neighborhood and because the City did not want two antennas on Mr. Wolf's roof. *See* Exhibit F, Sixth Circuit Opinion.

On June 13, 2000, Wolf sued the City of Ferndale in federal court challenging denial of the variance pursuant to the Telecommunications Act of 1996. The bench trial on Dec. 8, 2000 resulted in a verdict in favor of the City. Wolf appealed. The United States Court of Appeals for the Sixth Circuit ruled in favor of Wolf's claim on April 10, 2003. As a result of this lawsuit, the City was obligated to grant AT&T's application for an antennae on Wolf's Building. However, in the interim, the City stole AT&T as a customer from Wolf.

In November 2001, after the denial of the variance and while Wolf's second lawsuit was on appeal, the City amended its ordinance regarding cell antennas/towers. Scheer Dep., p. 62, Exhibit G. This new ordinance removed the prohibition against second antennas but requires owners to get special use permits. The new ordinance establishes no measurable standard for determining when a special use permit will be issued.

After the adoption of the new ordinance, Wolf or his representatives made contact with AT&T once again to determine whether it still desired a cell phone antennae in the area. Cato Dep., p. 30. AT&T still had a need for an antennae in the area to provide full service to this part of Woodward. Cato Dep., p. 31.

AT&T immediately sent Wolf a lease to finalize negotiations. *See* Draft Lease, Exhibit H. The lease called for monthly payments to Wolf with renewals subject to a rent escalation in future years.

As part of its efforts to gather data for constructing the antennae on the Building, AT&T met with individuals from the City. AT&T was informed that Wolf would never receive permission for a cell antennae. Cato Dep., pp. 32-33 and 103-105.

Shortly after this communication, AT&T put negotiations with Wolf on hold for one month. AT&T would not disclose the reason for this delay. When Wolf's agents attempted to

reach AT&T after the one-month period, they were informed that AT&T would not complete the lease agreement with Wolf. AT&T declined to provide any additional information or explanation for its decision. Cato Dep., pp. 37-38.

During this time, the City met with AT&T to explore construction of a tower on City property. The City approved the lease with AT&T without facing the requirements that the City forced other applicants to meet. Cato Dep., p. 46.

Notwithstanding his loss of the AT&T lease, Wolf determined to apply for the telecommunications cell antennae special use permit, and he hired David Donnellon, an architect who specializes in this area, to work with the City in preparing the proper application. Wolf Dep., p. 55, Exhibit I.

It became clear to Mr. Donnellon that the City was not going to cooperate in Wolf's application. The City repeatedly placed impediments to the application in Wolf's path. Wolf Dep., p. 75.

Rather than the stick-sized and relatively inconspicuous antenna that would have been necessary on the Building, the City built a pole that is over three feet in diameter and rises 100 feet from the ground. This tower is higher by at least thirty feet than the structure, including the building's height, that would have been required on the Building's roof. The City's tower is approximately 100 feet and Mr. Wolf's antennae, with the building, would have been about 60 feet. *See* Cato Dep., p. 43; Wolf Dep., p. 100.

The decision to deny Wolf's application, which he was entitled to have approved, and the conduct to prevent Wolf from re-applying for an antennae structure was done so that the City could obtain the AT&T contract and other wireless carrier contracts. The Defendants were motivated by personal and political gain and a desire to harm Wolf. These actions were not

taken for a legitimate government purpose. In fact, Defendants acted intentionally to gain an improper advantage and to interfere with Wolf's rights.

The addition of the antennae structure with the AT&T lease would have increased Wolf's current income and added a minimum of $300,000 in value to Wolf's Building.

III. Relevant Procedural History

Shortly after answering the Complaint, Defendants moved for dismissal of the Complaint on governmental immunity grounds. This motion was granted, in part, and denied, in part, by the Circuit Court's December 9, 2003 Opinion and Order Granting Defendants' Motion for Summary Disposition In Part. This Opinion and Order dismissed the mayor as a defendant as the highest ranking city official pursuant to MCL 691.1407(5) and held that further discovery was necessary on whether Defendants were engaged in a "proprietary function" and whether the other individual Defendants were high ranking officials. December 9, 2003 Opinion and Order, p. 3 attached as Exhibit K.

After additional discovery, Defendants filed a second motion for summary disposition on July 20, 2004. Defendants again asserted that governmental immunity barred Plaintiffs' claims.

Plaintiff timely responded to this motion. Attached as Exhibit L is a copy of Plaintiff's brief with exhibits.

On January 5, 2005, the Circuit Court issued its Opinion and Order re Defendants' Second Motion for Summary Disposition. This Opinion held that Defendants were engaged in a proprietary activity but that Plaintiffs' damages were not damages to "persons or property" within the meaning of MCL 691.1413. Exhibit A, p. 4. Therefore, the Court dismissed the remaining claims as to all Defendants.

Plaintiffs timely filed a motion for reconsideration on January 18, 2005. (The Brief in Support of the Motion for Reconsideration is attached as Exhibit M and the Supplemental Brief for Reconsideration is attached as Exhibit N.) This motion was denied by the Circuit Court on April 21, 2005. *See* Opinion and Order Denying Reconsideration, Exhibit B.

Plaintiffs timely appealed to the Court of Appeals on May 11, 2005. On December 20, 2005, the Court of Appeals issued its unanimous opinion and order reversing the Circuit Court on the issue of the application of governmental immunity to this case. *See* Opinion, Exhibit O.

Defendants filed a motion for reconsideration on January 20, 2005. This motion was quickly denied on February 7, 2006. *See* Order Denying Motion for Reconsideration, Exhibit P.

Defendants' Application for Leave to Appeal on May 11, 2005.

STANDARD FOR GRANTING LEAVE

The standard for granting leave to appeal is stated in MCR 7.302(B). The standards set forth therein are not met by the issues presented in the City's Application.

ARGUMENT

I. "Property Damage" Was Properly Interpreted By The Court Of Appeals

A. *The Court Of Appeals Expressly Recognized The Duty To Narrowly Construe The Immunity Statute, But Also Recognized It Could Not Rewrite The Statute In The Way The City Sought*

The City's chief argument is that the words "property damage" in the governmental immunity statute, MCL 691.1413, must be strictly limited to "physical" injury to property. Put another way, the City asks this Court to ***add*** a word to the statute not placed there by the legislature. Specifically, the City asks the Court to imply or read into the immunity statute the word "physical" just before the actual text "property damage." This, of course, does violence to the actual language of the statute in a way the Court of Appeals fully recognized.

First, the Court of Appeals expressly acknowledged its duty to narrowly construe the statute consistent with the legislature's intent. Opinion, 269 Mich.App. 265.

Second, unlike the City, the Court of Appeals relied upon Michigan authority for its decision.[1] In particular, and contrary to the City's bald assertions, the Court of Appeals considered that the term "property" has a broad meaning in Michigan law. This finding was supported by this Court's decision in *Citizens for Pretrial Justice v. Goldfarb,* 415 Mich. 255, 268; 327 N.W.2d 910 (1982). The City does not address this case in its brief.

The Court of Appeals recognized that when interpreting a statute, even if it must do so narrowly, it is not to abandon the legislature's intent and the ordinary meaning of the words. Opinion, 269 Mich.App. 265; *citing Koontz v. Ameritech Services, Inc.,* 466 Mich. 304, 312; 645 NW2d 34 (2002) and *People v. Lee,* 447 Mich. 552, 558; 526 NW2d 882 (1994).

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[1] For example, the City relies upon a case out of Iowa, *Felder v. State Farm Mutual Automobile Insurance Co.*, 494 N.W.2d 704 (Iowa 1993). *Felder* deals with the interpretation of an ***insurance policy***, not an immunity statute.

Here, Plaintiffs' claim that Defendants' tortious interference has caused injury to his property. At a minimum, a genuine issue of material fact remains on whether Plaintiffs have suffered property damages.

Michigan Courts have long permitted property damages as the measure of damages in tortious interference claims. *Peter Bill & Associates, Inc. v. Michigan Department of Natural Resources*, 93 Mich.App. 724, 733, 287 N.W.2d 334 (1980). In *Peter Bill*, plaintiff alleged that the DNR tortiously interfered with its efforts to salvage cargo from the S.S. Monrovia resting on the bottom of Lake Huron. The court rejected the State's argument that the trial court erred in awarding plaintiff the value of the steel remaining on the S.S. Monrovia:

> Since defendant's acts caused failure of the project, plaintiff was deprived of the steel remaining to be salvaged. Limiting plaintiff's damages to lost profits would be unjust, for profits were calculated on the assumption that a half-million dollars of steel would offset expenses (most of which were already incurred at the time of defendant's acts). Thus, the trial court properly used the value of the remaining steel as the basic measure of damages.

Peter Bill, 93 Mich. App. at 733. Thus, courts have recognized tortious interference damages measured by property damage.

Further, other courts have recognized that the government is not immune where it harms property interests. Indeed, "[A] person's business is property in the pursuit of which he is entitled to protection from tortious interferences by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business...." *NAACP v. Overstreet*, 142 S.E.2d 816, 823 (Ga. 1965). Tortious interference is within the scope of "harm to property." *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 330, 487 N.W.2d 715 (1992) (Levin, J. dissenting); *see also Detroit v. Campbell*, 146 Mich.App. 295, 380 N.W.2d 88 (1985) (an owner may receive compensation for lost customers when forced to relocate after the exercise of eminent domain).

Accepting the City's limited definition of "property," the government divisions of this State will be free to:

(a) tortiously interfere with business opportunities of the State's citizens;

(b) use proprietary materials of a third-party for its advantage without compensating the owner of the proprietary materials; and

(c) defame or slander third-parties to further proprietary interests so long as no "physical" damage occurs.

This clearly is not what the legislature intended. The legislature created liability for governments when they enter the commercial arena to pursue commercial interests. That is, governments cannot have a commercial advantage associated with immunity when engaged in proprietary activities. *See, generally, Lisieki v. Detroit-Wayne Joint Building Authority*, 364 Mich. 565, 568-69, 111 N.W.2d 803 (1961).

Finally, where does the "narrowness" of the City's argument end? Taken to its logical extreme, this Court should define "property" to mean only real property and not personal property. However, this illustrates the problem, why limit the injury to only real property? That would be the narrowest definition. But what rational is there for real property and not personal property except that such a limitation gives the "narrowest" result? There is no logical basis for drawing the line so narrowly, just as there is no basis for interpreting "property damage" as narrowly as the City advocates.

In short, the type of damages sought by Plaintiffs is covered by the term "property damage," and the Court of Appeals Opinion should stand.

B. *Tortious Interference Claims Are Within The Proprietary Function Exception To Governmental Immunity Because The Legislature Has Categorized Such Claims As Claims For "Damages For Injuries To . . . Property" In The Applicable Statute Of Limitations*

The Court of Appeals' Opinion is also correct because the City's arguments require language routinely used by the legislature to have two different meanings depending upon the statute in which the language rests. Reading the language differently depending on the statute is not consistent with Michigan rules of statutory construction.

The Legislature is presumed to use words that have been subject to judicial interpretation in the sense in which they have been interpreted. MCL 8.3a; *Kirkley v. General Baking Co.*, 217 Mich. 307, 316, 186 N.W. 482 (1922). The Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. *Carr v. General Motors Corp.*, 425 Mich. 313, 317, 389 N.W.2d 686 (1986). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Univ of Mich. Bd. of Regents v. Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037 (1911). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v. Redford Twp.*, 253 Mich. 453, 456, 235 N.W. 217 (1931). The Legislature is presumed to use words that have been subject to judicial interpretation in the sense in which they have been interpreted. MCL 8.3a; *see also Kirkley v. General Baking Co.*, 217 Mich. at 316.

Importantly, Michigan Courts have interpreted the legislative phrase "property damage" to encompass tortious interference clams where the phrase "property damage" is used in the applicable three-year statute of limitations for such claims. *See Wilkerson v. Carlo*, 101 Mich.App. 629, 300 N.W.2d 658 (1981) ("the type of interest allegedly harmed is the focal point in determining what limitations period controls and three-year statute of limitations applies to

tortious interference claims); *James v. Logee*, 150 Mich.App. 35, 388 N.W.2d 294 (1986) (three-year period of limitations applies to tortious interference claims, which are common law torts). The limitations statute reads:

> ***Injuries to persons or property***. Sec. 5805. (1) A person shall not bring or maintain an action to recover ***damages for injuries to persons or property*** unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover ***damages*** for the death of a person, or ***for injury to a person or property***.

MCL 600.5805. Michigan Courts have found that tortuous interference claims fall within this definition. *Joba Constr. Co. v. Burns & Roe, Inc.*, 121 Mich.App. 615, 625, 329 N.W.2d 760 (1982) (tortious interference is subject to the three-year period of limitation); *DSX, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462, 471 (6th Cir. 1996) (MCL 600.5805 three-year statute of limitations applies to tortious interference with business relations claims, citing *James v. Logee*, 150 Mich.App. 35 (1986)); *Valente v. Valente*, 2004 WL 1778817, *5 (Mich.App. August 10, 2004) (same).

Thus, when the Legislature used the phrase "property damage" in the immunity statute, the Legislature knew and intended that tortious interference claims would be considered claims for "***property damage***" under the proprietary function exception because that's is the only way to read the language consistently with prior interpretations of the same language.[2] *See also Robinson v. City of Detroit,* 462 Mich. 439, 613 N.W.2d 307 (2000). (considering use of similar terms in other statutes in construing Governmental Immunity Act exception).

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[2] MCL 600.5805 was enacted under the Public Acts of 1961 and took effect January 1, 1963. MCL 691.1413 was enacted under the Public Acts of 1964 and took effect July 1, 1965. Thus, the statute of limitation statute pre-dates the immunity statute. Both contained the similar "property damage" language when enacted.

In sum, the City advocates a too narrow construction of the term "property damage" in MCL 691.1413 and does so in such a way as to create an inconsistency as to the meaning of "property damage" under Michigan law.

II. The Challenged Activity Is "Proprietary"

A. *There Can Be Little Doubt That The City Engaged In A Proprietary Function When It Leased The Cellular Tower For Purposes Of Pecuniary Gain*[3]

"[A] governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." M.C.L. § 691.1407(1). A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." M.C.L. § 691.1401(f). A government unit is not protected by governmental immunity where it is engaged in a proprietary function. M.C.L. § 691.1413 states:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

As discussed in the Introduction, the Circuit Court has already determined that Defendants were engaged in a proprietary function. This finding cannot be subject to review at this point because it was not the subject of any cross-appeal.

In *Louis Eyde,* 2004 WL 1366936, the Court of Appeals considered whether a township could claim governmental immunity based on a governmental function in virtually identical

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[3] The City claims that the Circuit Court did not decide whether the City's operation of a cellular tower was a proprietary function under MCL 691.1407. That statement is false, because at p. 3 of the Opinion, the Circuit Court expressly incorporated all of the findings of *Eyde v. Meridian Township*, 2004 WL 1366936 (Mich. App. June 17, 2004). *Eyde* found that the lease of a cellular tower by a government unit to a private entity is a proprietary function. To say the Circuit Court did not reach this issue is to ignore the Circuit Court's reliance on and express adoption of the *Eyde* holding.

circumstances as this case. The court was faced with whether a tortious interference claim could be brought against a township that denied the plaintiff a special use permit (SUP) to erect a cellular tower and agreed instead to erect a communication tower on township property. The Court of Appeals held:

> Clearly, defendants' action of deciding whether to grant a SUP to AWS is a government function. However, even so, defendants are not entitled to summary disposition on grounds of governmental immunity. Plaintiffs' theory is that defendants employed the otherwise legitimate governmental function of deciding whether to grant SUP's for the improper purpose of advancing their own proprietary interests of having the exclusive right to the financial benefit of an agreement to erect a communications tower. On the record before us, we are convinced that a fact question exists on this issue. Consequently, establishing that acting on applications for SUP's like that of AWS is a governmental function provides no grounds for dismissing this case.

Id. at *3.

Clearly, *Louis Eyde* vitiates the City's governmental immunity defense because it makes clear that a City can be liable for the tort of tortious interference and that a City cannot rely upon the use of a governmental function to further a proprietary activity.

Indeed, independent examination of the proprietary function test proves *Eyde* is correct. To demonstrate that governmental action is a proprietary function, "[t]wo tests must be satisfied: The activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v. Kootsillas*, 456 Mich. 615, 621, 575 N.W.2d 527 (1988); *Hyde v. Univ. of Michigan Bd. of Regents*, 42 Mich. 223, 257-58, 393 N.W.2d 847 (1986).

As in *Eyde*, (1) the City's primary purpose here is to raise a profit (Cato Dep., p. 151); (2) the money is deposited into the City's general fund (Barwin Dep. at 54, Exhibit 10 to Exhibit L); and (3) the only cost to the city associated with this revenue is the cost to replace a flag. Cato Dep. at 47; Scheer Dep. at 42-43.

Numerous City actions confirm that the primary purpose of the tower was to make a profit. First, in its negotiation with AT&T in 2001, the City sought to increase rent and escalate the rent more quickly in a letter dated April 30, 2002. Exhibit 11 to Exhibit L (LC0051). Second, the City chose to build a 100 foot tower instead of an 80 foot tower. Cato Dep. at 43. This allowed multiple cellular carriers to use the antenna, increasing the City's potential revenue. *Id.* at 42-44. The City also originally insisted that AT&T allocate only one space on the tower to T-Mobile. Exhibit 12 to Exhibit L (LC0393). This decision was intended to allow the City to increase revenue by the addition of a third cellular carrier. Cato Dep. at 43-44. Based on this evidence, the primary purpose of the tower was to increase the City's revenue. *See* Cato Dep. at 151.

With regard to the second factor, the Defendants leased the City's land to a private commercial entity for the construction and operation of a cellular tower to deliver private cellular service. This is not the type of activity that is normally supported by taxes and fees. *See Eyde*, 2004 WL 1266936 at *2. Additionally, the Defendants' have provided no evidence that this activity is of the type normally supported by taxes or fees. *See id.*

B. *Wolf's Claims Are Not Based Upon The Denial Of A Special Use Variance*

Contrary to the City's assertions, Wolf was not injured because he was denied a Special Use Variance but because the City acted to interfere with his ability to obtain such a variance for the sole purpose of obtaining a profitable contract with AT&T at the expense of Wolf. Indeed, Lauren Cato of AT&T made it clear in her testimony that Wolf was never going to get fair consideration from the City and that AT&T had to look at City locations if it wanted a tower in Ferndale. Cato Dep., pp. 32-33 and 103-105.

In sum, Defendants pursued AT&T and other carriers and then instructed them to make a proposal to the City. Cato Dep. at 31-37. Moreover, they inhibited Plaintiff's application to the zoning board through various unauthorized measures. See Exhibit 13 to Exhibit L, W00097-W00100.

Essentially what the City contends is that it can use its governmental functions to unfairly compete in the market. This is not the law. *See, e.g., Central Telecommunications, Inc. v. City of Jefferson City, Mo.,* 589 F.Supp. 85 (D.C.Mos. 1984) (finding immunity defense did not bar common-law claims against the city where city used its governmental powers to further a proprietary function). The government cannot engage in a proprietary function and cloak itself in immunity. *See Radloff v. State*, 116 Mich.App 745, 753, 323 N.W.2d 541 (1982) ("A state agency may engage in a proprietary function at the same time it is engaged in a governmental function, but where such a dual use of property is evident, the proprietary function must be separated from the governmental function, and the government agency loses its immunity as to the proprietary use").

The City acted tortiously when it stole Wolf's telecommunications customer. Here, the act of leasing space for a commercial cellular phone tower is unquestionable proprietary, in pursuit of which, the government exceeded its authority. Immunity does not extend to protect the City in its attempts to gain a commercial advantage against Wolf.

C. *The Court of Appeals Did Not "Reverse" The Circuit Court On This Question*

Contrary to the City's Brief at p. 20, the Court of Appeals did not reverse the Circuit Court on the "proprietary function" question. The Circuit Court found that the City was engaged in a proprietary function. ***The City never appealed this issue***. Thus, the question has not been preserved for review by this Court. *See In re MCI Telecommunications Complaint*, 460 Mich. 396, 432-433; 596 N.W.2d 164, 184 (1999)("[T]he arguments advocated herein are those

accepted by the Court of Appeals. Appellee Ameritech has neither applied for leave to cross appeal on this issue, nor offered this argument as an alternative rationale to support the favorable ruling it received below. Accordingly, this issue, itself, is not properly before the Court. Since it is not suggested that the findings of the Court of Appeals are erroneous on this issue, we accept that Court's determination...")(footnotes omitted).

III. Res Judicata Does Not Apply To This Case

Res judicata is not a tool to "narrow the facts and issues" and cannot justify the exclusion of facts from evidence because of prior litigation between the parties. Res judicata is a complete bar to recovery for a cause of action. As this cause of action was not and could not have been resolved in any of the first three lawsuits, res judicata does not apply.

"Res judicata bars a subsequent action between the same parties when the essential facts or evidence are identical." *Board of County Road Com'rs for County of Eaton v. Schultz*, 205 Mich.App. 371, 375, 521 N.W.2d 847 (1994). Res judicata doesn't apply if the facts change or new facts develop. *Ditmore v. Michalik*, 244 Mich.App. 569, 577, 625 N.W.2d 462 (2001), *appeal denied*, 465 Mich. 896, 625 N.W.2d 462 (2001); *Labor Council, Michigan Fraternal Order of Police v. City of Detroit*, 207 Mich.App. 606, 608, 525 N.W.2d 509 (1994).

> [The] principle [of res judicata or estoppel by judgment] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities....

Pike v. City of Wyoming, 431 Mich. 589, 598, 433 N.W.2d 768 (1988) *quoting Internal Revenue Comm'r v. Sunnen,* 333 U.S. 591, 599, 68 S.Ct. 715, 720 (1948).

This lawsuit seeks damages for conduct that occurred in late 2001 and into 2002 when Wolf and AT&T once again were negotiating to place an antennae on Wolf's building and when

Wolf again filed an application for an antennae. These facts could not be, and were not, litigated in any prior action.[4]

The first and second Lawsuits arose out of the first joint application for an antennae made by AT&T and Wolf in 1999, which the City, as found by the United States Sixth Circuit Court of Appeals, wrongfully denied. The present lawsuit involves Wolf's and AT&T's relationship after the City changed its ordinance in November 2001 and Wolf sought to reapply with AT&T in 2002. It also involves the city's rejection of his spec antenna in 2002. The events at issue are separated by two years and involve separate applications for approval by the City.

Therefore, res judicata has no application to this case.

IV. Plaintiff Has Stated A Claim For Tortious Interference

Defendants also contend that the Court of Appeals erred by not reversing the Circuit Court's finding that Wolf, even if immunity does not apply, did not state a tortious interference claim. The issues presented by this argument were not the basis for the Circuit Court's findings and should have been the subject of a cross-appeal if the City objected to this finding. *In re MCI Telecommunications Complaint*, 460 Mich at 432-433. Not only was this issue not properly preserved, it is also an inherently factual issue not raising the type of serious or important points of law this Court should seek to review.

Wolf's claims for tortious interference with a business relationship and tortious interference with a prospective business relationship result from two series of events.

When the City of Ferndale changed its zoning ordinance in November 2001, Wolf sought a wireless carrier to engage in a joint application for construction of an antennae. Among the carriers Wolf contacted was AT&T, who would be the beneficiary of Wolf's Sixth Circuit appeal and had previously contracted for an option/lease to place an antenna on the roof of the Building.

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[4] The Court should consider that the guidance from *Eyde* was not available at that time.

When Wolf and AT&T were negotiating the terms of a second lease/option and close to a deal, the City interfered and AT&T withdrew from negotiations.

After AT&T withdrew from negotiations, Wolf sought approval for a "spec antenna." Based on its prime location, a second antenna on the Building would have increased its value and allowed Wolf to contract with another carrier. Wolf hired David Donnellon to submit an application for construction of an additional antenna to the City. The City, however, made it clear that it would not approve Wolf's antenna and made it difficult for Donnellon to submit Wolf's application. Donnellon was unable to successfully complete Wolf's 2001 cellular application. As a result, Wolf's business relationship with Donnellon terminated, and his prospective business relationships with wireless carriers languished.

With respect to tortious interference with an advantageous business relationship: "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a business relation with another." *Winiemko v. Valenti*, 203 Mich. App. 411, 416 (1994) *quoting from Northern Plumbing & Heating, Inc. v. Henderson Bros., Inc.,* 83 Mich.App. 84, 93 (1978). The elements of tortious interference with a business relationship or prospective business relationship are: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Winiemko*, 203 Mich. App. at 416; *Bonelli v. Volkswagen of America, Inc.*, 166 Mich. App. 483, 496 (1988).

The City's apparent argument on this issue is that they could engage in their unlawful conduct because of a federal decision, later reversed in part, had upheld the City's denial of a previous application by Wolf. The City asserts that because of this decision, it was free to pursue AT&T. The City ignores a critical fact.

The City amended its ordinance in 2001. It was under this ordinance that Wolf was to seek a new tower with the City. Thus, assuming the City could rely upon the prior federal decision, that decision no longer applied to the facts at issue because the City could not believe it was entitled to deny Wolf a tower under the *new* Ordinance, which had never been subject to judicial review.

Worse, AT&T was not "free" to discuss a tower with Ferndale. AT&T was *required* to do so because of the City's tortious conduct. AT&T was expressly informed that AT&T should not pursue an application with Wolf in the 2001-2002 time frame. Specifically, AT&T was told "not to go there" and AT&T took this statement seriously.

> Q: . . . You considered the 'you should not go there' as an off-the-cuff comment?
>
> A: Not that comment, no. That was pretty much a discussion of what direction should we take here. [Cato Dep., pp. 104-05.]

The Court of Appeals decision to not review this issue is, in the end, a recognition that the issue was not properly preserved.

CONCLUSION

For the above reasons, the Court should deny leave to appeal in this case.

Respectfully submitted,

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